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Supreme Court of the United States

October Term, 1949

No. 456

THE INTERNATIONAL UNION OF UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., et al.,

Appellants,

v.

GERALD K. O'BRIEN, Wayne County Prosecuting Attorney and STEPHEN J. ROTH, Attorney General of the State of Michigan,

Appellees.

Brief Amicus Curiae for the States of Kansas and Wisconsin

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NATURE OF INTEREST OF AMICI

While the States of Kansas and Wisconsin do not have statutes identical with the Michigan law which is involved in this appeal, they do regulate some aspects of industrial conflict, including certain incidents of strikes and of lockouts,[1] including one involving a strike vote.[2]

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[1] See Kan. G. S. 1935 secs. 44-601 et seq. and secs. 111.01 to 111.19 of the Wis. Statutes, 1949.

[2] See sec. 111.06 (2) (c), as interpreted in Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1941) 236 Wis. 329, 346-347, aff. 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706.

The interest of these *amici* is in judicial recognition of an area for state regulation sufficient to enable a state to prevent infringement upon its internal public welfare in situations in which it must cope with the results of unregulated action.

The states have responsibility for policing undesirable concomitants of industrial strife, and for alleviation of the unemployment and suffering which are often incidents of strikes and lockouts. The incidence of a strike or lockout in an industry within a state carries a local impact which imposes responsibilities on state government distinct from the more general problems.

With respect to the general problems involving the national health and safety, states cannot adequately cope. With respect to the more limited problems which have their primary impact within the borders of the state, the state government carries the primary responsibility.

So far as we have been able to ascertain, no states have endeavored to outlaw strikes and similar weapons of industrial conflict except, perhaps, in limited circumstances involving vital industries or government service.[1] A number of states have, however, enacted legislation respecting certain aspects of industrial conflict so as to prevent its being carried out in a manner to infringe unduly upon the welfare of the public. Different states have chosen the methods they deemed best suited to local situations and needs. Such local regulations have often provided real benefit to the nation as a whole by providing pragmatic tests for evaluating legislation later proposed on a federal level.

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[1] See, for example, secs. 111.50 to 111.65, Wis. Statutes, 1949.

States not only may, but must, cope with violence to person and property and infringement upon personal and public rights. Problems of this nature may occur in connection with strikes and lockouts, and are more frequently encountered in strikes upon which the opinion of the employees involved is in conflict than in those having the support of most of the persons primarily affected. If a clash of opinion between employees and employer is accompanied by a difference of opinion among the employees themselves, clashes over strikebreaking and other manifestations of friction are far more difficult to govern by ordinary policing than in strikes carried out according to the will of the majority of those participating. Some states, such as Michigan and Wisconsin, have deemed it in the interest of the public to require that the wishes of the employees be ascertained formally, and that unless a majority favors the strike, a strike is subjected to sanctions which may vary according to state policy.[1] The reasons above referred to provide a proper basis for such legislative policy in the exercise of state police power.

Legislation regulating strike activities, if otherwise valid under the primary guaranties of the constitution, must be recognized as properly within the area reserved to states if they are to cope adequately with their internal problems.

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[1] In Wisconsin, the Supreme Court has stated that the sanction is in the nature of loss of certain statutory privileges. See Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1941) 236 Wis. 329, 347.

ARGUMENT

I.

STATE LAWS WHICH CURB STRIKES DO NOT CONFLICT WITH FEDERAL LEGISLATION

A. Congress has not Preempted the Field of Strike Regulation so as to Preclude Supplementary Regulation by states

As pointed out in *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 where Congress "leaves the employee employer relationship free from regulation in some aspects, it implies that in such matters federal policy is indifferent." The principle was applied in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, to regulation of strike activities, with respect to which the court said:

> "It seems clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.'"

Where the state legislation applies to activities which the federal law does not forbid, nor authorize the National Board to forbid, the issue is stated in the foregoing case to be "whether Congress has protected the union conduct which the state has forbidden, and hence the state legislation must yield."

Congress has not legislated so as to subject to federal action strikes which are called without approval of the majority of the employees affected.

The only basis, then, upon which it could be urged that Congress had precluded states from regulating in such field (except on grounds of inconsistency which will be discussed in the succeeding subsection) is that Congress intended such regulation of strikes as it undertook to be the only regulation. If that were the Congressional intent, it would invalidate not only such legislation as is involved in this case but all other state legislation dealing with aspects of strike activities such as those involved in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 and *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516.

Congress, however, regulated strike activities only to the limited extent which it believed appropriate on a national scale. By refraining from further regulation, it did not intend to give affirmative sanction to all other strike activities so as to preclude all state regulation.

Its failure to prohibit certain activities was due, in many cases, to a belief that such matters were more appropriately covered by local regulation. See, for instance, the following excerpts of arguments made before Congress when the Labor Management Relations Act, 1947, was adopted. In opposing further restriction on employee activities, Congressman Lane stated:

> "Most of the real abuses which the bill proposes to penalize are already violations of state law to which violators are subject." (Vol. I, Legislative History of Labor Management Relations Act, 1947, 655)

Congressman Holifield said, in opposing inclusion in the bill of regulation of certain union strike activities:

> "In any event, the use of force or violence which does not have for its primary purpose the restraint of trade, is already unlawful and an offense under state laws. There is no necessity therefore to make such acts violations of the anti-trust acts, and in the process convert the already over-burdened United States District Courts into police courts, or to convert such purely local offenses into federal offenses. * * *" (Vol. I, Legislative History of Labor Management Relations Act, 1947, 842.)

While the above arguments did not relate directly to provisions involving strike votes, they are examples of the fact that much of the field of labor relations left outside of the scope of federal regulation was left untouched not because Congress wished to protect it, but because it was deemed more appropriately and effectively regulated on a local scale.

Congress would not have included in the Labor Management Relations Act, as it did, a requirement that parties terminating or modifying collective bargaining contracts should notify "any state or territorial agency established to mediate and conciliate disputes within the state or territory where the dispute occurred"[1] if it had not recognized the right of states to take steps toward preventing strikes and lockouts.

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[1]Sec. 8 (d), Labor Management Relations Act, 1947, 29 U. S. C. A. App. sec. 8 (d).

B. Congress Did Not Guarantee the right to Strike against the Wishes of the Majority of Employes affected

The primary purpose of Congress in enacting the National Labor Relations Act and its successor, Labor Management Relations Act, 1947, was not to encourage strikes; but to render unnecessary, wherever possible, the use of such coercive weapons as strikes or lockouts by protecting and encouraging collective bargaining. The Short Title and Declaration of Policy of the latter act reads:

> "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[2]

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[2] 29 U. S. C. A. App. sec. 141.

In the Findings and Policies, it is stated that:

> "Experience has further demonstrated that certain practices by some labor organizations * * * have the intent or the necessary effect of burdening or obstructing commerce *by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest* or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Emphasis supplied)

It was because of the objective to prevent stoppages of production resulting from strikes and lockouts, that the saving provision of sec. 13 was necessary. That section reads:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right.*" (Emphasis supplied)

The provision that nothing in the act shall effect "limitations or qualifications" on the right to strike is significant. In the light of such decisions as *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 and *International Union v. Wisconsin E. R. Board,* (1949) 336 U. S. 245, 69 S. Ct. 516, it is apparent that Congress recognized limitations imposed by state law as well as by federal law.

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[7] 29 U. S. C. A. App. sec. 151.

[8] 29 U. S. C. A. App. sec. 164.

Certainly there is nothing in the federal legislation to indicate a guaranty to a minority of employees to call a general strike without the approval of the majority. The whole process of collective bargaining under federal legislation is based upon the principle of majority rule. A law providing a method by which the majority of employees are permitted to effectuate their will on the question of striking is consistent with the same principle.

A state law leaving to the employees the question of whether they should strike does not conflict with federal regulations relating to bargaining units. Obviously a state law can have no extra-territorial effect. It can apply only to such employees within a unit as are within the territorial limits of the state. In order to take a strike vote in a case where a bargaining unit includes employes in other states, there is no need to set up a separate unit. The vote is necessarily limited to such part of the employees in the unit as are subject to the state law. Their election not to strike would have no effect upon the collective bargaining to be carried on for the unit. Protection of collective bargaining was intended by Congress to result in settlement of disputes without strikes and lockouts in a greater number of cases.

The fact that employees may be subject to state regulation in some respects, even though they constitute a part of the bargaining unit set up under federal legislation, is recognized in *Wisconsin E. R. Board v. Algoma P. & W. Co.*, (1949) 336 U. S. 301, 69 S. Ct. 584. The legislation upheld in that case required a vote by the employees before a contract requiring membership in a union as a condition of employment could be applied within the state.

II.

A LAW CONDITIONING STRIKES UPON A MAJORITY VOTE OF THE EMPLOYEES AFFECTED DOES NOT VIOLATE ANY PROVISION OF THE CONSTITUTION

The state law here under attack does not forbid strikes. It merely gives the right to determine whether there shall be a strike, to the persons upon whom the primary burden and hardship will fall.

It was pointed out by this court in *Palko v. Connecticut*, (1937) 302 U. S. 319, 326, 58 S. Ct. 149, 82 L. ed. 288 that the rights guaranteed by the Fourteenth Amendment against infringement through state legislation, are only those rights of the common law of so fundamenal a nature that "neither liberty nor justice would exist if they are sacrificed." The court said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining v. New Jersey*, supra, p. 99. * * *"

In the words of the court in that case, p. 328, the test with respect to the constitutionality of any specific legislation is:

"Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

As pointed out by this court in *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, 589-590, 17 S. Ct. 427, 41 L. ed. 832:

"* * * The liberty mentioned in that amendment [the 14th] means not only the right of the citizen to be free from the mere physical restraint of his person, * * * but the term is deemed to embrace all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; * * *."

Under the foregoing rules, it is within the scope of a state's police power to regulate the extent of permissible interference with the pursuit of lawful employment.

The strike is an intentional infliction of harm; and as such has always been recognized as within the field of tort so as to require justification, even in the absence of legislation. See Restatement, Torts, Chapter 38.

A good discussion appears in Teller, *Labor Disputes and Collective Bargaining*, Vol. 1, sec. 14, pages 34-39, which reads in part:

"There is a school of thought which contends for an unlimited right to strike at common law, and a corresponding unlimited right to engage in a primary, peaceful boycott. How can combination, it is asked, change the character of an act? It is denied that mere combination can constitute criminal or tortious, acts which each member of the combination is free to do. * * *

"* * *

> "The mold of American law has generally developed an apparent disregard, however, of arguments seeking to justify private collective action. American courts have generally looked askance upon the organized attempt by labor to assert an absolute right to strike. The general rule has been tersely stated in State v. Stockford to the effect that 'A strike may be lawful or it may be unlawful and criminal. * * * The great preponderance of judicial authority holds that individually blameless acts may become illegal if done in combination. The reasons advanced to explain this disregard by the common law of that which to some courts and writers appear to be unassailable logic are varied and interesting, but in the main beside the point. * * *"

It was recognized in *Dorchy v. Kansas*, (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248 not only is a strike "clearly coercion."

Activities of such a nature are susceptible to regulation under the police power. The policies adopted by the courts of many jurisdictions to refrain from interference in industrial conflict under the common law has been accompanied by a recognition that it is an appropriate field for legislative regulation. The legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."[*]

In the *Dorchy case, supra*, this court upheld a Kansas statute prohibiting, under criminal sanction, the calling of a strike. The court said:

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[*]Dissenting opinion of Justice Brandeis in **Duplex Printing Press Co. v. Deering**, (1921) 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172.

"* * * Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. * * *"

In *France Packing Co. v. Dailey*, (C. C. A. 1948) 166 F. 2d 751 the Circuit Court of Appeals for the Third Circuit upheld the provision of the War Labor Disputes Act prohibiting a strike for thirty days after notice, and pointed out the reason why the provisions of the constitution relating to involuntary servitude have no bearing upon legislation regulating strikes. The court said: (loc. cit. 166 F. 2d 753, 754):

"Support for its decision was found by the court below in the Constitutional protection against involuntary servitude; * * *.

"The contention that a limitation of the right to strike under the specified narrow conditions of Section 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, *there is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand.* * * *

"* * *

"In brief, the restricted limitation of the right to strike, in this Act, refers to circumstances involving a continuing master and servant relationship. *There is no involvement here with the distinct—and unquestioned-right of the worker to quit his job* or the right of the employer to discharge him for cause. In this situation we fail to see any true constitutional question in this case." (Emphasis supplied)

The court has again, very recently, tacitly recognized that there is no constitutional objection to an injunction restraining a union and its officials from encouraging workers to interfere with production by strike or cessation of work. See *United States v. United Mine Workers of America,* (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677.

Many of the cases cited by the appellants have arisen in connection with the historical doubt of the right to strike at all, and pronouncements of the so-called "right to strike" have been in recognition of the particular jurisdiction's philosophy on the question of public policy in the *absence* of legislation. The appellants confuse assertions of the so-called "right" to strike in such cases (which is nothing more than a recognition that such action is not unlawful in the absence of legislative proscription) with the inalienable rights guaranteed by the constitution. The mere recognition that a certain course of conduct is not unlawful in the absence of prohibition should not be translated into the proposition that the constitution protects such activity from any regulation. There is a vast difference between a right by sufferance and an inalienable right protected by the constitution.

The case of *State ex rel. Hopkins v. Howat,* (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686 is another in which a law restricting strikes was upheld. Writ of error was dismissed by the United States Supreme Court in *Howat v. Kansas,* (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

See, also, the decision of the United States Supreme Court in *Southern S. S. Co. v. National Labor Relations Board,* (1942) 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 246, in which it recognized the right of Congress to make unlawful a seamen's strike even when the boat was docked.

CONCLUSION

A statute which places sanctions upon the calling of a strike without the approval of a majority of the persons primarily affected is within the proper scope of legislative authority, in which "some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces"[10] may be imposed by a state in the interest of the community.

Respectfully submitted,

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[10]**Carpenters & Joiners Union, etc. v. Ritter's Cafe,** (1943) 315 U. S. 722, 62 S. Ct. 807, 86 L. ed. 1143.